UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CARMEN PEREZ, et al.,

Plaintiffs,

v.

BATH & BODY WORKS, LLC, et al.,

Defendants.

Case No. 21-cv-05606-BLF

ORDER DENYING IN PART AND GRANTING IN PART WITHOUT LEAVE TO AMEND MOTION TO DISMISS SECOND AMENDED COMPLAINT

[Re: ECF No. 102]

In this case, Plaintiff Carmen Perez[1] challenges representations made on a series of products sold by Defendants Bath & Body Works, LLC and Bath & Body Works, Inc. ("BBW"). Perez alleges that BBW falsely claims that hyaluronic acid, an ingredient in those products, "attracts and retains up to 1,000x its weight in water to make skin look smoother and more supple." She brings three common law claims and three California consumer protection claims and seeks to represent a California class of consumers who purchased the products after July 21, 2017.

Now before the Court is BBW's motion to dismiss under Rule 12(b)(1). ECF No. 102 ("MTD"); *see also* ECF No. 104 ("Reply"). Perez opposes the motion. ECF No. 103 ("Opp."). The Court held a hearing on the motion on May 3, 2023. *See* ECF No. 109. For the following reasons, the Court DENIES IN PART and GRANTS IN PART WITHOUT LEAVE TO AMEND the motion to dismiss.

[1] The Court separately granted Defendants' motion to compel arbitration as to claims brought by Plaintiff Andrea Brooks and stayed proceedings on her claims. *See* ECF No. 77.

I. BACKGROUND

As alleged in the Second Amended Complaint, Defendants market products including skin creams, lotions, scrubs, shampoos, conditioners, scents, and body wash to consumers who visit BBW's stores or website. ECF No. 95 ("SAC") ¶ 38. Among those products is a line called "WATER" / "HYDRATING", which includes several products that use hyaluronic acid:

- BBW Hyaluronic Acid Hydrating Body Cream (in varying scents);
- BBW Hyaluronic Acid Hydrating Hand Cream (in varying scents);
- BBW Hyaluronic Acid Hydrating Body Wash;
- BBW Hyaluronic Acid Hydrating Body Gel Lotion; and
- BBW Hyaluronic Acid Mineral Body Polish (in varying scents).

Id. ¶ 41 (the "Products").

Perez alleges that BBW makes false claims on the Products "to trick consumers into believing that the [Products] contain unique moisturizing properties." SAC ¶ 52. Perez provides the example of the Hyaluronic Acid Hydrating Body Cream. *Id.* ¶¶ 53–55. The back of the tube of that product allegedly contains the following representation: "attracts and retains up to 1,000x its weight in water to make skin look smoother and more supple" ("1,000x claim"). *Id.* ¶ 54. Perez alleges that in-store personnel were instructed to make these claims, that in-store, point-of-sale advertising included these claims, and that BBW's website contains similar representations. *Id.* ¶¶ 56–58. Perez also alleges that BBW "makes materially identical claims for all of its Hyaluronic Acid Products." *Id.* ¶ 60. Perez alleges that the product labels for the Body Gel, Body Wash, and Hand Cream all include the 1,000x claim. *Id.* ¶¶ 61-63. She alleges that the 1,000x claim is made on the website and point-of-sale advertising for the Body Polish. *Id.* ¶ 64.

Perez alleges that the 1,000x claim is false. SAC ¶¶ 70-71. The hyaluronic acid in the product is, for example, allegedly not capable of absorbing 1,000 times its weight in water. *Id.* ¶¶ 71-81. Perez alleges that BBW knows these representations are false but made them anyway to take advantage of a growing market for beauty and skincare. *Id.* ¶¶ 82–91.

In approximately February or March 2019, Plaintiff Carmen Perez visited a BBW store in Milpitas, California and purchased the Hyaluronic Acid Hydrating Body Cream. SAC ¶ 93.

Based on the representations made on the product and repeated by a store employee, Perez believed the product was capable of moisturizing and hydrating her skin. *Id.* ¶¶ 93-94. Perez did not observe any improvement on her skin after use. *Id.* ¶ 95.

This lawsuit was field on July 21, 2021, *see* ECF No. 1, and Perez filed the First Amended Complaint on January 10, 2022, *see* ECF No. 47. The Court issued an Order granting in part and denying in part a motion to dismiss the FAC. *See Perez v. Bath & Body Works, LLC*, No. 21-cv-05606-BLF, 2022 WL 2756670 (N.D. Cal. July 14, 2022). On October 28, 2022, Plaintiff filed the operative Second Amended Complaint. *See* SAC. She asserts claims for violation of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.*, SAC ¶¶ 117-27; violation of the False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 *et seq.*, SAC ¶¶ 128-39; fraud, deceit, and/or misrepresentation, SAC ¶¶ 140-50; negligent misrepresentation, SAC ¶¶ 151-58; violation of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, SAC ¶¶ 159-69; and a quasi-contract claim for restitution, SAC ¶¶ 170-74. Perez seeks to represent a class of all persons who purchased any of the Products from BBW in California from July 21, 2017 to the present. *Id.* ¶¶ 105-16.

II. LEGAL STANDARD

A party may challenge the Court's subject matter jurisdiction by bringing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). "[T]he 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan*, 504 U.S. at 560-61). "A plaintiff bears the burden of demonstrating that her injury-in-fact is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Davidson v. Kimberly-Clark Corporation*, 889 F.3d 956 (9th Cir. 2018) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)); *see also Spokeo*, 578 U.S. at 338 ("The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements." (citing *FW/PBS, Inc. v. Dallas*, 493

U.S. 215, 231 (1990))).

III. ANALYSIS

A. Injunctive Relief

1. Standing

BBW argues that Perez lacks standing to pursue injunctive relief because she cannot establish injury. MTD at 5-10. BBW also argues that Perez lacks standing to pursue injunctive relief because her requested injunction is not traceable to her alleged injuries and because it is beyond the Court's ability to redress. *Id.* at 10-12.

BBW first argues that Plaintiff cannot establish an injury in fact. MTD at 5-10. Defendants argue that Plaintiff cannot allege a desire to purchase the product as advertised in the future, which is required under case law. *Id.* at 7-8. BBW asserts that Plaintiff could never allege that she wanted to purchase the product as advertised because she also alleges it is scientifcally impossible for hyaluronic acid to retain 1,000x its weight in water. *Id.* at 8. Finally, BBW also asserts that because Plaintiff alleges that the 1,000x claim is false, there is no danger that she be misled in the future. *Id.* at 9.

The Ninth Circuit addressed the availability of injunctive relief to a previously deceived consumer who brings a false advertising claim in *Davidson*. *See* 889 F.3d 956. In that case, the plaintiff alleged that the product, Scott Wipes that were labeled as "flushable," were not in fact flushable. *Id.* at 961-62. The Ninth Circuit recognized it was "an open question in this circuit to what extent a previously deceived consumer who brings a false advertising claim can allege that her inability to rely on the advertising in the future is an injury sufficient to grant her Article III standing to seek injunctive relief." *Id.* at 967. The court held "that a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an 'actual and imminent, not conjectural or hypothetical' threat of future harm." *Id.* at 969 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). The court identified two examples of threatened future harm. "In some cases, the threat of future harm may be the consumer's plausible allegations that she will be unable to

rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to." *Id.* at 969-70. "In other cases, the threat of future harm may be the consumer's plausible allegations that she might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved." *Id.* at 970. The court thus indicated it was "not persuaded that injunctive relief is *never* available for a consumer who learns after purchasing a product that the label is false." *Id.* (emphasis in original) (quoting *Duran v. Creek*, No. 3:15-cv-05497-LB, 2016 WL 1191685, at *7 (N.D. Cal. Mar. 28, 2016)).

The court ultimately determined that the plaintiff in that case had standing to seek injunctive relief because she faced an imminent or actual threat of future harm, and her injury was concrete and particularized. *Davidson*, 889 F.3d at 971-72. The Ninth Circuit stated that she had alleged "that she facts an imminent or actual threat of future harm" based on her allegations "that she desires to purchase Kimberly-Clark's flushable wipes" because flushable wipes are more sanitary. *Id.* at 971. The injury was particularized because it would affect the plaintiff "as a direct consumer" of the product, "in a personal and individual way." *Id.* And the injury—"her inability to rely on the validity of the information advertised on Kimberly-Clark's wipes despite her desire to purchase truly flushable wipes"—was concrete. *Id.* The Ninth Circuit explained that the plaintiff faced "the similar injury of being unable to rely on [the defendant's] representations of its product in deciding whether or not she should purchase the product in the future." *Id.* at 971-72.

The Ninth Circuit again addressed the issue in 2021, this time in the context of an appeal of an order granting class certification. *See In re Coca-Cola Prods. Mktg. & Sales Pracs. Litig.*, No. 20-15742, 2021 WL 3878654 (9th Cir. Aug. 31, 2021). In that case, the plaintiffs alleged that the following statement was misleading—"*no artificial flavors. no preservatives added. since 1886*"—because the product included phosphoric acid, which is a chemical preservative or artificial flavor. *Id.* at *1. The Ninth Circuit determined that the plaintiffs had not demonstrated a threat of future harm sufficient to support their claim for injunctive relief. *Id.* The court noted that "[n]one of the plaintiffs in this case allege a desire to purchase Coke *as advertised*, that is, free from what they believe to be artificial flavors or preservatives, nor do they allege in any other

fashion a concrete, imminent injury." *Id.* at *2 (emphasis in original). In that case, the plaintiffs "ha[d] 'each stated that if Coke were properly labeled, they would consider purchasing it.'" *Id.* The court stated that "such an abstract interest in compliance with labeling requirements is insufficient, standing alone, to establish Article III standing" and that "the imminent injury requirement is not met by alleging that the plaintiffs would *consider* purchasing Coke." *Id.* (emphasis in original).

The court addressed various groups of plaintiffs. *In re Coca-Cola*, 2021 WL 3878654 at *2. It determined two plaintiffs did not have standing to seek injunctive relief because they did not have any stated desire to purchase Coke in the future. *Id.* It determined that four other plaintiffs did not have standing to seek injunctive relief because their "declarations that they would 'consider' purchasing properly labeled Coke are insufficient to show an actual or imminent threat of future harm." *Id.* And finally, it addressed two plaintiffs who "explained that they were not concerned with phosphoric acid, but rather with whether Coca-Cola was telling the truth on its product's labels." *Id.* Both plaintiffs stated that "they would be interested in purchasing Coke again if its labels were accurate, regardless of whether it contained chemical preservatives or artificial flavors." *Id.* The court explained that a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation." *Id.* (quoting *Spokeo*, 136 S. Ct. at 1550). It continued that "[a]n asserted informational injury that causes no adverse effects cannot satisfy Article III." *Id.* (quoting *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021)). The Ninth Circuit therefore concluded that these plaintiffs did not have standing to seek injunctive relief, as their "desire for Coca-Cola to truthfully label its products, without more, is insufficient to demonstrate that they have suffered any particularized adverse effects." *Id.*

Plaintiff alleges as follows:

> Ms. Perez continues to want to purchase Bath & Body Works products that could help improve the appearance of her skin, including, specifically, Bath & Body Works Hyaluronic Acid and moisturizing products such as those described above. She desires to purchase these and other cosmetic products from B&BW, and regularly visits B&BW stores where Defendants' products are sold. Without purchasing and having the Products professionally tested or consulting scientific experts, Ms. Perez will be unable to determine if representations that Defendants make regarding the properties and

> features of its products are true. Ms. Perez understands that the formulation of Defendants' Products may change over time or that Defendants may choose to market other products that contain misleading representations about the product. But as long as Defendants may use inaccurate representations about the capabilities of their hyaluronic acid products, then when presented with Defendants' advertising, Ms. Perez continues to have no way of determining whether the representations regarding those capabilities are true. Thus, Ms. Perez is likely to be repeatedly presented with false or misleading information when shopping and unable to make informed decisions about whether to purchase Defendants' products. Thus, she is likely to be repeatedly misled by Defendants' conduct, unless and until Defendants are compelled to utilize accurate representations regarding the actual capabilities of hyaluronic acid.

SAC ¶ 97. The Court determines that these allegations are sufficient to survive a motion to dismiss. Perez alleges that she continues to want to buy BBW products, including the Hyaluronic Acid Products at issue in this case. But she cannot determine whether the representations on the Products are true. This falls into one of the types of injury identified in *Davidson*—"the threat of future harm may be the consumer's plausible allegations that she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to." 889 F.3d at 969-70.

BBW argues that this matter is distinguishable from *Davidson* because there, the wipes could conceivably be flushable, but here, Plaintiff alleges that the 1,000x claim scientifically could not be true. MTD at 8. But the Court declines to look at the threatened injury so narrowly. *See* Opp. at 7. "Where standing is premised entirely on the threat of repeated injury, a plaintiff must show 'a sufficient likelihood that he will again be wronged in a similar way.'" *Davidson*, 889 F.3d at 967 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). "In determining whether an injury is similar, [a court] 'must be careful not to employ too narrow or technical an approach.'" *Id.* (quoting *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001)). "Rather, [a court] must examine the questions realistically: [it] must reject the temptation to parse too finely, and consider instead the context of the inquiry.'" *Id.* (quoting *Armstrong*, 275 F.3d at 867). In *Davidson*, the Ninth Circuit explained that the plaintiff "face[d] the similar injury of being unable to rely on [defendant's] representations of its product in deciding whether or not she should purchase the product in the future." *Id.* at 971-72 (citing *Lyons*, 461 U.S. at 111). The Court determines that the plaintiff faces the same injury here.

In a similar vein, BBW points to language in *In re Coca-Cola* in arguing that the plaintiff needs to allege a desire to purchase the product as advertised. MTD at 7. But the Ninth Circuit stated that "[n]one of the plaintiffs in this case allege a desire to purchase Coke *as advertised*, that is, free from what they believe to be artificial flavors or preservatives, nor do they allege in any other fashion a concrete, imminent injury." 2021 WL 3878654, at *2 (emphasis in original). The Ninth Circuit thus left open the possibility that a plaintiff could allege "a concrete, imminent injury" even without alleging a desire to purchase the product "as advertised." Further, as Defendants note, that case was decided on a motion for class certification, not at the pleading stage, and the plaintiffs there only stated that they would *consider* buying the products in the future, while Plaintiff here alleges that she would like to buy the products in the future.

This case is distinguishable from *Anthony v. Pharmavite*, which Defendants rely on. MTD at 8-9; *see* No. 18-cv-02636-EMC, 2019 WL 109446 (N.D. Cal. Jan. 4. 2019). In that case, the court found that the plaintiffs did not have standing to seek injunctive relief. 2019 WL 109446, at *6. The plaintiffs did not allege that they intended to purchase the products—biotin supplements—again in the future. *Id.* And the claim was based on the premise that biotin supplements "are unneeded, superfluous, and will not provide any benefits to anyone without a biotin deficiency." *Id.* Because the plaintiffs alleged that there was nothing the defendant, Pharmavite, could do to change the advertising or product to make the supplements beneficial, the court concluded that the plaintiffs did "not face the 'injury of being unable to rely on [Pharmavite]'s representations of its [Biotin Products] in deciding whether or not [they] should purchase the [Biotin Products] in the future.'" *Id.* (alterations in original) (quoting *Davidson*, 889 F.3d at 971-72). Here, the Plaintiffs are not alleging that the Hyaluronic Products are completely useless; instead, they are alleging that the 1,000x claim about hyaluronic acid is false. Even if hyaluronic acid cannot retain 1,000 times its weight in water, it is not necessarily useless as a moisturizer. Therefore, Plaintiff could plausibly still want to purchase the Products, and Plaintiff alleges that she does want to purchase the Products.

Defendants also argue that Plaintiff's allegations as to a desire to purchase the Products in the future should be discounted because they were only added in the SAC and because she alleges

that the products "don't work and are essentially worthless." MTD at 7-8. Plaintiff counters that she nowhere alleges that the products "don't work" or are "totally worthless," and she argues that this question is improper to decide on a motion to dismiss. Opp. at 9-10. She also notes that, in the previous complaint, she alleged that she was willing to buy BBW "beauty" products. *Id.* at 9. The Court agrees with Plaintiff. The Court must accept all allegations as true at the motion to dismiss stage and, as noted by Plaintiff, if it discounted the allegation because it was added in the SAC, "there would be no point in granting leave to amend." *Roffman v. Perfect Bar, LLC*, No. 22-cv-02479-JSC, 2023 WL 174961, at *2 (N.D. Cal. Jan. 12, 2023).

Defendants also argue that the injunction requested by Plaintiff in the SAC is improper. MTD at 10-12. Plaintiff requests the Court :

> Enjoin[] Defendants, . . . in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any product containing hyaluronic acid, from making a representation about the product's or ingredient's ability to hold, retain, or absorb water in any quantity and from any source unless, at the time the representation is made, Defendants possess and rely upon competent and reliable evidence, that, when considered in light of the entire body of relevant and reliable evidence, is sufficient in quantity and quality based on standards generally accepted in the relevant fields, to support such representation. For the purposes of this paragraph, "competent and reliable evidence" means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by qualified persons, using procedures generally accepted in the profession to yield accurate and reliable results.

SAC, Prayer for Relief, ¶ C.

BBW argues that the requested injunction is overly broad and not related to the alleged misrepresentation—the 1,000x claim. MTD at 11. Therefore, Defendants argue, Plaintiff has not met the requirements that her injury be traceable to the misrepresentation and that it be redressable by the Court. *Id.* Perez asserts that it is premature to dismiss the request for an injunction because of how the injunction is stated in the Prayer for Relief. Opp. at 10-12.

The Court agrees with Plaintiff. Under Rule 8(a)(3), a complaint must contain "a demand for the relief sought." Fed. R. Civ. P. 8(a)(3). Under Rule 54(c), a district court must grant "the relief to which each party is entitled, even if the party has not demanded that relief in its

pleadings." Fed. R. Civ. P. 54(c). The Court agrees that it is premature to dismiss the request for injunctive relief based upon the language in the Prayer for Relief. At the conclusion of the case, if Plaintiff is entitled to injunctive relief, the Court is required to fashion an appropriate injunction at that time. It is not restricted to the exact language requested in the operative complaint. Therefore, it would be premature to dismiss the claim for injunctive relief based on the language in the SAC.

BBW's motion to dismiss all claims for injunctive relief for lack of standing is thus DENIED.

2. Mootness

BBW also argues that injunctive relief is improper because there is nothing to enjoin. MTD at 12-14. BBW argues that Plaintiff has no evidentiary support that it continues to sell the Products. *Id.* at 12-13. BBW claims that Plaintiff's allegation that sales are continuing is "conclusory," and the Court should dismiss the request for injunctive relief on this basis. *Id.* at 13. Plaintiff responds that whether the claim is moot is a factual question that cannot be decided on a motion to dismiss. Opp. at 12-13.

The Court agrees with Plaintiff. At the motion to dismiss, the Court must accept as true the allegations in the pleadings. Perez alleges that the 1,000x claim was made "[t]hroughout the class period and continuing to the present." SAC ¶ 52; *see also* SAC ¶ 138 ("Defendants continue to make the false 1,0000X claim in connection with their sales of Hyaluronic Acid Hand Cream."). Plaintiff's allegations, taken as true, are sufficient to survive a motion to dismiss.

B. Standing to Pursue Claims Regarding Body Polish

BBW challenges Perez's standing to pursue claims challenging the BBW Mineral Body Polish. MTD at 14-15. Perez only purchased the Hyaluronic Hydrating Body Cream. SAC ¶ 93. The Court previously granted with leave to amend BBW's motion to dismiss for lack of standing as to unpurchased products. *Perez*, 2022 WL 2756670, at *7-8. In amending her complaint, Plaintiff added allegations for the additional products—the Hand Cream, Hydrating Body Wash, Hydrating Body Gel Lotion, and Mineral Body Polish. SAC ¶¶ 61-64. Defendants ask the Court to dismiss the claims as to the Mineral Body Polish. MTD at 14-15.

In the SAC, Plaintiff added the product labels for the Hand Cream, Hydrating Body Wash, and Hydrating Body Gel Lotion. SAC ¶¶ 61-64. All included the 1,000x claim. *Id.* But Plaintiff did not add the product label for the Mineral Body Polish; she instead submitted a screenshot of the product from BBW's website. SAC ¶ 64. She alleges that the 1,000x claim was made "on [BBW's] website and point-of-sale advertising." *Id.* Defendant argues that Plaintiff has not shown substantial similarities between the purchased product—the Hydrating Body Cream—and the Body Polish because there is no allegation that the Body Polish label included the 1,000x claim. MTD at 14-15. BBW notes that the screenshot of the Body Polish in the SAC does not show the back label or top or bottom of the product, nor the product's ingredients. *Id.*

To pursue claims based on non-purchased products, a plaintiff must allege facts sufficient to show that there are substantial similarities between purchased and non-purchased products. *See Wilson v. Frito-Lay N. Am.*, 961 F. Supp. 2d 1134, 1141-42 (N.D. Cal. 2013). Courts look to factors such as "whether the challenged products are of the same kind, whether they are comprised of largely the same ingredients, and whether each of the challenged products bears the same alleged mislabeling." *Leonhart v. Nature's Path Foods, Inc*, No. 13-cv-00492-BLF, 2014 WL 6657809, at *3 (N.D. Cal. Nov. 21, 2014) (quoting *Wilson*, 961 F. Supp. 2d at 1141).

The Court finds that Perez's allegations are insufficient to support the inference that the Body Polish is substantially similar to the Hydrating Body Cream. Perez has not alleged that the claim at issue—the 1,000x claim—can be found on the product labeling of the Body Polish. *See* SAC. An allegation that the claim appears on the website for the Body Polish is insufficient to show a substantial similarity.

BBW's motion to dismiss all claims as to the Mineral Body Polish for lack of standing is thus GRANTED. Plaintiff already had two opportunities to amend the complaint. Therefore, the motion to dismiss the claims as to the Mineral Body Polish is granted WITHOUT LEAVE TO AMEND.

IV. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss the claim for injunctive relief is DENIED; and

2. Defendants' motion to dismiss all claims as to the Mineral Body Polish is GRANTED WITHOUT LEAVE TO AMEND.

Dated: May 15, 2023

BETH LABSON FREEMAN
United States District Judge